

IN RE: AMENDMENT OF IDAHO)	
RULES OF CIVIL PROCEDURE)	
(I.R.C.P.) 16(b), 26(b)(4), 33(a)(2), 33(c))	
34(a), 34(b), 35(a), 36(a), 37(a), and)	ORDER AMENDING RULES
REPEALING OF RULE 45(a)(b)(c)(d)(e))	
and (f), and ADOPTION OF NEW)	
RULES 26(b)(5)(A), 26(b)(5)(B) and)	
45(a)(b)(c)(d)(e)(f)(g) and (h))	
_____)	

The Court having appointed a Special Committee to do a comprehensive review on the discovery rules in Idaho and report on the findings of the committee, and the Court having received the report of the Discovery Rules Committee and having reviewed the Committee's recommendation for changes,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Idaho Rules of Civil Procedure, as they appear in the volume published by the Idaho Code Commission, be, and they are hereby, amended as follows:

1. That Rule 16 (b) be, and the same is hereby, amended to read as follows:

Rule 16(b), Scheduling and Planning.

Except in cases exempted by order of the court as inappropriate, the judge or magistrate shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order that limits the time

- (1) to join other parties and amend the pleadings;
- (2) to file and hear motions; and
- (3) to complete discovery.

The scheduling order may also include:

- (4) The appointment of a special master under Rule 53 to assist the parties in the management of any discovery provided for in the Idaho Rules of Civil Procedure.
- ~~(4~~ 5) the date or dates for conference to review settlement or ADR options;
- ~~(5~~ 6) the date(s) for other conferences, including a final pretrial conference and trial; and
- ~~(6-7)~~ any other matters appropriate in the circumstances of the case.

The order shall be issued as soon as practical and, unless it is totally impractical, no more than 180 days after the filing of the complaint. A schedule shall not be modified except by leave of the judge or magistrate upon a showing of good cause.

2. That Rule 26 (b)(4) be, and the same is hereby, amended to read as follows:

Rule 26(b)(4). Trial preparation - Experts.

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained ~~only as follows~~ by interrogatory and/or deposition, including:

(A) (i) ~~A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the opinions to which the expert is expected to testify and to state the underlying facts and data upon which the expert opinions are based, in conformity with Rule 705 I.R.E. A complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.~~ (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate. (iii) No party shall contact an expert witness of an opposing party without first obtaining the permission of the opposing party or the court.

3. That new Rules 26(b)(5)(A) and 26(b)(5)(B) be, and the same are hereby, adopted to read as follows:

Rule 26(b)(5)(A). Privileged information withheld.

When a party withholds information otherwise discoverable under these rules by claiming it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Rule 26(b)(5)(B). Privileged information produced.

When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

4. That Rule 33(a)(2) be, and the same is hereby, amended to read as follows:

Rule 33(a). Interrogatories to parties - Availability - Procedures for use.

* * *

(2) Answers to Interrogatories. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections may be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve the original of the answers, and objections if any, within ~~15~~ 30 days after the service of the interrogatories; ~~except that a defendant may serve answers or objections within 30 days after service of the summons and complaint upon that defendant.~~ The court may allow a shorter or longer time. The answers shall first set forth each interrogatory asked, followed by the answer or response of the party. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer any interrogatory.

5. That Rule 33(c) be, and the same is hereby, amended to read as follows:

Rule 33(c). Option to produce records.

Where the answer to an interrogatory may be derived or ascertained from the business or other records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business or other records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

6. That Rule 34(a) be, and the same is hereby, amended to read as follows:

Rule 34(a). Production of documents, electronically stored information, ~~and things~~, and entry upon land for inspection and other purposes - Scope.

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things including electronic and data storage devices in any medium which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

7. That Rule 34(b) be, and the same is hereby, amended to read as follows:

Rule 34(b). Procedure.

(1) The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable

particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. To obtain discovery of data or information that exists in electronic or data storage devices in any medium, the requesting party must specifically request production of such data and specify the form or manner of delivery in which the requesting party wants it produced.

(2) The party upon whom the request is served shall serve a written response within ~~15~~ 30 days after the service of the request, ~~except that a defendant may serve a response within 30 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.~~ The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event any reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. As to electronic or data storage devices in any medium, the responding party must produce the data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot through reasonable efforts retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(3) The request for production, the response thereto, and all or any documents produced pursuant to this Rule shall not be filed with the court. The party demanding an inspection or production shall retain both the original of the inspection or production demand, with the original proof of service affixed to it, and the original response, until one (1) year after final disposition of the action. At that time, both originals may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period.

8. That Rule 35 (a) be, and the same is hereby, amended to read as follows:

Rule 35(a). Physical and mental examination of persons. ~~Order for examination.~~

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the parties by stipulation or the court in which the action is pending may order the party to submit to a physical or mental examination by a physician, or a qualified mental health professional as defined in section 6-1901, Idaho Code, excluding nurses, if the mental, emotional, or psychological condition of a party is at issue, or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

9. That Rule 36(a) be, and the same is hereby, amended to read as follows:

Rule 36(a). Requests for admission.

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within ~~45~~ 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed under oath by the party or by the party's attorney, ~~but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 30 days after service of the summons and complaint upon him.~~ If objection is made, the reasons therefore shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested represents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it. The answers shall first set forth each request for admission made, followed by the answer or response of the party.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

The genuineness, accuracy or truth of any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit.

10. That Rule 37(a) be, and the same is hereby, amended to read as follows:

Rule 37(a). Sanctions for violation of orders - Motion for order compelling discovery.

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, taken in connection with litigation pending outside the state, to the district court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

11. That Rule 45(a)(b)(c)(d)(e) and (f) is hereby repealed in its entirety and a new Rule 45 is adopted to read as follows:

Rule 45(a). Subpoena - For attendance of witnesses - Issuance.

Every subpoena shall be issued by the clerk of the district court under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to appear to give testimony at trial, or at hearing, or at deposition at a time and place therein specified. A command to produce or to permit inspection and copying of documents, electronically stored information or tangible things, or to permit inspection of premises, may be joined with a command to appear at trial, or at hearing or at deposition, or may be issued separately. The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. Provided, an attorney licensed in Idaho as officer of the court may also issue and sign a subpoena.

Rule 45(b). Subpoena for production or inspection of documents, electronically stored information or tangible things, or inspection of premises. The scope and procedure shall comply with Rule 34, except that the person must be allowed at least 30 days to comply.

(1) The subpoena to attend a deposition, trial or hearing may also command the person to whom it is directed to produce or permit inspection and copying of the books, papers, documents, electronically stored information or tangible things designated therein.

(2) A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents, electronically stored information, or tangible things, or to permit inspection of premises may be served at any time after commencement of the action. The party serving the subpoena shall serve a copy of the subpoena on the opposing party at least seven (7) days prior to service on the third party. The party serving the subpoenas shall pay the reasonable cost of producing or copying the documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party serving the subpoena shall provide to the requesting party copies of all documents obtained in response to the subpoena.

(3) A person commanded to produce or permit inspection and copying of documents, electronically stored information or tangible things or to permit inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear at trial, at hearing or at deposition.

(4) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

Rule 45 (c) Form.

The subpoena shall be in substantially the following form.

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR _____ COUNTY

(MAGISTRATE DIVISION)

Party's name and
designation,

vs.

SUBPOENA

Party's name and
designation.

The State of Idaho to: _____:

YOU ARE COMMANDED:

[] to appear in the Court at the place, date and time specified below to testify in the above case.

[] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[] to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below.
(list documents or objects)

[] to permit inspection of the following premises at the date and time specified below.

PLACE DATE AND TIME: _____

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this _____ day of _____, 20__.

By order of the court.

Clerk

Deputy

(Court Seal)

Rule 45(d). Protection against subpoena. The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable, oppressive, fails to allow time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden or (2) condition compliance with the subpoena upon the advancement of the reasonable cost of producing the books, papers, documents, electronically stored information or tangible things by the person in whose behalf the subpoena is issued.

Rule 45 (e) (1). Witness fees and expenses.

Witness fees and expenses in the district court and the magistrates division thereof shall be in the amounts provided for under Rule 54(d)(1).

Rule 45(e)(2). Service of subpoena.

A subpoena may be served by an officer authorized by law to serve process or by any other person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by giving or offering to the person at the same time, if demanded, the fees for one (1) day's attendance and the mileage allowed by law, except that no prepayment tender of fees and mileage shall be necessary to witnesses subpoenaed by the attorney general or any prosecuting attorney on behalf of the state. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. When service is by an officer it must be returned with the officer's certificate of service, and when served by any other person it must be returned with an affidavit of such person of its service.

Rule 45(f)(1). Subpoena for taking depositions - Place of examination.

Proof of service of a notice to take a deposition as provided in Rules 30 and 31, or the presentation of a stipulation for the taking thereof, constitutes a sufficient authorization for the issuance by the clerk of the district court for the county in which the action is pending, or by the clerk of the district court for the county in which a deposition is being taken to be used in an action pending in another state or country, of subpoenas for the person named or described therein. The subpoena commanding the appearance of a witness at a deposition may also command the person to whom it is directed to produce or to permit inspection and copying of designated books, papers, documents, electronically stored information, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 30 and subdivision (b) of this Rule 45, except that if the action is pending out of the state, the court issuing the subpoena shall have the authority to enforce such rules.

Rule 45(f)(2). Depositions - Attendance where required.

A resident of the state may be required to attend an examination only in the county wherein the resident resides or is employed or transacts business in person. A nonresident of the state may be required to attend in any county of the state wherein the nonresident is served with a subpoena.

Rule 45(g). Subpoena for a hearing or trial.

At the request of any party subpoenas for attendance at a hearing or trial shall be issued as provided by Rule 45(a), and such subpoenas for a hearing or trial in a district court or magistrates division may be served at any place within the state.

Rule 45(h). Contempt for nonobedience of subpoena.

Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of the court from which the subpoena issued, in addition to the penalties provided by law.

IT IS FURTHER ORDERED, that the above designation of the striking of words from the Rules by lining through them, and the designation of the addition of new portions of the Rules by underlining such new portion is for the purposes of information only as amended, and NO OTHER AMENDMENTS ARE INTENDED. The lining through and underlining shall not be considered a part of the permanent Idaho Rules of Civil Procedure.

IT IS FURTHER ORDERED, that this order shall be effective on the 1st day of July, 2006.

DATED this __17th__ day of _____March_____, 2006.

By Order of the Supreme Court

_____/s/_____
Gerald F. Schroeder, Chief Justice

ATTEST: _____/s/_____
Stephen W. Kenyon, Clerk